

# Communications with the Public

DECEMBER 2014

## I. Introduction

### A. Purpose and Structure of Review

FINRA is conducting a retrospective review of its communications rules, and is publishing this report on the assessment phase of the review.<sup>1</sup> The purpose of the review is to assess whether the communications rules are meeting their intended investor protection objectives by reasonably efficient means and to take steps to maintain or improve the effectiveness of the rules while minimizing negative economic impacts. The review is part of an ongoing initiative launched in April 2014 to periodically look back at significant groups of rules to ensure they remain relevant and appropriately designed to achieve their objectives, particularly in light of industry and market changes.

FINRA has separated the review into an assessment phase and an action phase. During the assessment phase, which is the focus of this report, the staff analyzed the effectiveness and efficiency of the communications rules as currently implemented. The assessment encompassed not only the substance and application of the rules, but also FINRA's processes to administer them.

In the ensuing action phase, FINRA staff intends to consider specific rule proposals or other initiatives resulting from the assessment phase. FINRA will engage in its usual rulemaking process to propose any amendments to the rules based on the assessment.

### B. Assessment Process

The staff followed an extensive, multi-step assessment process. The process afforded stakeholders the opportunity to share their experiences with, and opinions of, the communications rules and included multiple avenues of feedback from the industry. The staff first solicited broad and diverse views through issuance of *Regulatory Notice 14-14* requesting comment on the effectiveness and efficiency of the communications rules. The *Notice* explained the review process and asked the following questions with respect to the rules:

1. Have the rules effectively addressed the problem(s) they were intended to mitigate?
2. What have been experiences with implementation of the rule set, including any ambiguities in the rules or challenges to comply with them?
3. What have been the costs and benefits arising from FINRA's rules? Have the costs and benefits been in line with expectations described in the rulemaking?
4. Can FINRA make the rules more efficient and effective, including FINRA's administrative processes?

FINRA received 17 comments in response to the *Notice*.

In addition, FINRA staff spoke directly with firms and individuals who have direct and substantial experience with the rules. The staff conducted interviews with these subject matter experts (SMEs) representing a cross-section of firm sizes and business models, and diverse viewpoints. The SMEs also included outside counsel knowledgeable about the rules.

During these discussions, FINRA staff invited candid feedback as to which rules are working effectively and efficiently and which are not. The staff expressly sought feedback on the specific provisions or processes that could be improved and endeavored to understand why a rule or provision is not working—for example, lack of clear standards, excessive costs relative to the protection afforded investors, or failure to keep up with technological or market changes. The staff asked the SMEs to identify particular “pain points” in the implementation and administration of the rules and to provide details or examples as to how the rules are impacting their businesses, the markets and investors. The staff also inquired about any regulatory gaps that may exist with the rules, emphasizing that investor protection remains FINRA’s paramount concern.

The staff also sought out the experiences of FINRA’s internal operating departments that work with the rules. The staff integrated the input received from comments to the *Regulatory Notice*, the SME discussions and other consultations and developed a thematic summary of the views expressed. The staff validated the summary with a broader group of stakeholders, including FINRA advisory committees and interested trade organizations.

The thematic summary of the views also informed another critical step in the validation process: the development of a survey that was distributed to all FINRA member firms and non-member firm SMEs. The survey tested the views that emerged during the comment and SME interview process and permitted respondents to identify potentially missing points of view. The survey included general questions about the respondent’s size, business model and degree of engagement with the communications rules to illuminate correlations that could benefit the assessment. The survey also included free text sections to allow respondents to identify issues that may not have been captured by the themes or amplify answers to questions. The survey responses are discussed in detail in Section IV below.

## **II. Background and Objectives of the Communications Rules**

The communications rules are intended to protect investors by ensuring that the communications used by broker-dealers are fair, balanced and not misleading. FINRA first adopted the rules in December 1980.<sup>2</sup> The rules impose core, principles-based content standards that are consistent with investor protection objectives<sup>3</sup> and also set forth minimum supervision requirements designed to ensure the content standards are applied. For example, the rules require that an appropriately qualified registered principal approve some communications distributed to large groups of retail investors prior to use.<sup>4</sup> In addition, the rules provide for reviews by FINRA to ensure rule compliance. Specifically, the rules require broker-dealers to file certain retail communications with FINRA for review either prior to use or shortly after use<sup>5</sup> and also permit FINRA staff to conduct spot checks of communications that are not normally subject to a filing requirement.<sup>6</sup>

### III. Stakeholder Views

After considering the viewpoints expressed in the comments to *Regulatory Notice 14-14* and during discussions with the SMEs, FINRA advisory committees and trade organizations, as well as the feedback from FINRA's operating departments, the staff identified the following common themes with respect to the communications rules:

- ▶ **General Observations:** Most stakeholders agreed that the communications rules have been effective at addressing the problems they were intended to mitigate. However, the stakeholders also identified a number of areas where they believed the investor protection objectives and economic impacts do not align or where the rules could be made more effective or efficient.
- ▶ **Filing Requirements:** Many of the stakeholders asserted that while the filing requirements serve to protect investors, they are overbroad in some respects relative to the investor protection they provide. They stated that the filing requirements impose significant direct and indirect costs on firms and potentially divert FINRA resources from higher risk matters. Firms also contended that the high volume of materials filed with FINRA has resulted in a backlog of filings to be reviewed, and some firms expressed concern that the backlog could potentially put investors at risk of receiving misleading communications while FINRA's post-use review is pending. Many firms suggested that a risk-based approach to filing would be a better use of both firm and FINRA resources.
- ▶ **Disclosure:** Stakeholders asserted that the amount of required disclosure has become disproportionate to the substance of marketing materials, diminishing their value to investors and giving the impression that the risks outweigh the benefits of the investment. Some stakeholders asserted that FINRA staff seems to expect almost as much risk disclosure in sales material as is contained in the prospectus. They further stated that FINRA staff interpretations of the content standards do not allow for layered disclosure (such as hyperlinks or references to other sources of information or offering documents), which would be more efficient and effective. They also asserted that over-inclusive disclosure requirements discourage materials that would educate investors about strategies (*e.g.*, diversification), products, services, fees and expenses. In addition, stakeholders contended that the comparison requirements are too burdensome, unclear and limit cross-product comparisons.
- ▶ **Clarity and Transparency:** Stakeholders asserted that the principles-based content standards lead to challenges in the application of those standards. Some stakeholders asserted that the key content standards—*e.g.*, “principles of fair dealing,” “fair and balanced,” “exaggerated” and “unwarranted”—are too subjective and can force firms to choose between filing voluntarily to get FINRA review or assuming the risk of an examination finding or enforcement action. Despite these challenges, most firms favored retaining the broad content standards—in part because they are flexible enough to address new products as they arise—but encouraged FINRA to provide detailed guidance. While stakeholders found the guidance given to date helpful, they generally suggested that guidance needs to be more frequent and capture the Advertising Regulation Department's comments to filings in a consolidated way. One area that drew frequent comment involved the restrictions on predictions or projections and performance standards. Many stakeholders favored more permissive use of predictions or projections and alternative performance standards (*e.g.*, hypothetical and back-tested performance, related performance, model performance and targeted returns) and greater clarity with respect to the current requirements.

- ▶ **Investment Adviser vs. Broker-Dealer Standards:** Stakeholders noted that the regulatory standards differ for broker-dealers and investment advisers when communicating or providing investment advice about securities and that firms and investors would benefit from harmonization of these standards, particularly in the area of projections, performance and testimonials. Some firms also said that there is widespread confusion and disagreement as to which rules apply with respect to dual registrants when they are communicating with customers. These firms encouraged FINRA to provide more guidance on this point.
- ▶ **Web/Social Media/Mobile Communications:** Technology has had a significant impact on the way broker-dealers communicate today, and stakeholders said that the communications rules have not kept pace with these technological innovations. While they acknowledged that FINRA's social media guidance has been helpful, they believe more clarity and flexibility are needed to effectively apply the rules to online content and distribution. In particular, firms asked for clarification regarding: (1) disclosure delivery and content in online, mobile and social media contexts; and (2) obligations with respect to content controlled and managed by a third party that is linked or otherwise referenced on a firm's website. Several stakeholders suggested that FINRA should maintain an advisory group, similar to the Social Media Task Force, to ensure broad and regular input from the industry on issues related to emerging technologies, communications and distribution methods. In addition, stakeholders stated that the current SEC record retention requirements are antiquated and hinder their ability to effectively use electronic communications and social media.
- ▶ **Administration:** While stakeholders commended the professionalism and responsiveness of the Advertising Regulation Department staff, they believed that the administration of the rules could be improved in several ways, including improving consistency of analyst reviews and updating the electronic filing system to permit submission of materials in formats other than PDF. Some stakeholders also were under the impression that when the media format for a piece changes, they must re-file it with FINRA. Stakeholders also expressed some frustration with the turnaround times for review of communications and encouraged FINRA to explore ways to make more efficient use of its resources.
- ▶ **Definitions:** Stakeholders appreciated many of the 2012 amendments to the rules that, among other things, streamlined the categories of communications. However, they asserted that a few definitions in the rules continue to impact their businesses. Some said the definition of institutional investor is too narrow in scope, while others expressed general frustration with the various institutional investor standards within FINRA rules and the federal securities laws. Several stakeholders commented that the new definition of correspondence—any written communication sent to 25 or fewer retail investors within any 30 calendar-day period—restricts communications with existing customers and is too difficult to track; therefore, they have not availed themselves of this category that was intended to reduce their burdens. In addition, some stakeholders suggested that FINRA reinstate public appearance as a separate category of communication to facilitate treatment of social media communications.
- ▶ **Economic Impacts:** The stakeholders noted several additional direct and indirect impacts of the rules as implemented. Stakeholders asserted that the direct costs of filing and re-filing, including expedited filing fees, can be significant, particularly where they must convert electronic media to PDF. Many firms further indicated that the indirect costs associated with filing and re-filing exceed those direct costs, most significantly the staff and technology resources needed to carry out the compliance functions required by the rules. In addition, firms contended the increased use of electronic and social media communications is increasing the effort of reviewing communications internally. One person asserted that the rules are anti-competitive because they make FINRA a marketing partner for firms that file and pay a fee to have their communications reviewed.

## IV. Survey

### A. Summary of Survey Responses

The survey of member firms and non-member firm SMEs was developed as a method to collect broad feedback on the observations provided through the interview phase of the retrospective rule review process. It served as a method to corroborate or invalidate the primary concerns expressed regarding the communications rules and to identify other possible issues not captured in the SME interviews or by commenters. The survey solicited responses to questions regarding the effectiveness of the current regulatory regime, the priorities for updating the existing rules and the related interpretations and guidance, and the costs and burdens associated with the current rules.

The member firm survey was sent to all FINRA member firms, approximately 4,200 firms, of which 626 either partially or fully completed the survey. The survey of non-member firm SMEs was sent to 40 SMEs, of which 13 responded. The survey results validated many of the key concerns raised by the SMEs and commenters, with a substantial percentage of respondents agreeing with every key concern raised by the SMEs and commenters. But the survey also revealed a diversity of opinion among respondents on several themes.

Respondents expressed mixed views on the effectiveness of certain rules, particularly those relating to filing requirements, disclosures, and content standards and the associated economic impacts. The SMEs and commenters generally expressed concerns about overbroad filing requirements, over-inclusive disclosures, lack of clarity on the content standards and disproportionately large costs to comply with the rules. Most of the survey respondents, however, reported that the filing requirements are justified, disclosures are appropriate, the content standards are clear and that the costs associated with the rules are reasonable. The staff's analysis revealed that these results are mostly driven by respondents with less direct and regular experience with the rules.

FINRA staff examined the extent to which respondents' views and experiences varied based on their filing activity, firm size or other business characteristics. Some of these characteristics were chosen because the staff believes that they reasonably identify firms with more direct experience with the rules. The survey responses suggested that firms with more filings, larger firms, and firms that offer mutual fund or variable insurance products generally expressed opinions that were more consistent with the concerns raised by the SMEs and commenters.

The staff's analysis of key themes in the responses is set forth below.

### B. Characteristics of Member Firm Respondents

Survey respondents represented a diverse set of business lines, firm sizes, filing activity and other business characteristics. Respondents included broker-dealers retailing equity or fixed income securities, mutual fund retailers, and firms offering variable insurance products, private placement of securities, investment advisory services, or other products and services. Approximately 82 percent of the respondents represented small firms, whereas mid-size and large firms were represented by 8.8 percent and 8.9 percent of the respondents, respectively.<sup>7</sup> Two-thirds (67 percent) of the responding firms reported that they did not file any communications material with FINRA last year,<sup>8</sup> whereas 24 percent of them filed 100 or fewer communications, and the remaining 8 percent filed more than 100 communications (frequent filers).

## C. Analysis of Survey Responses

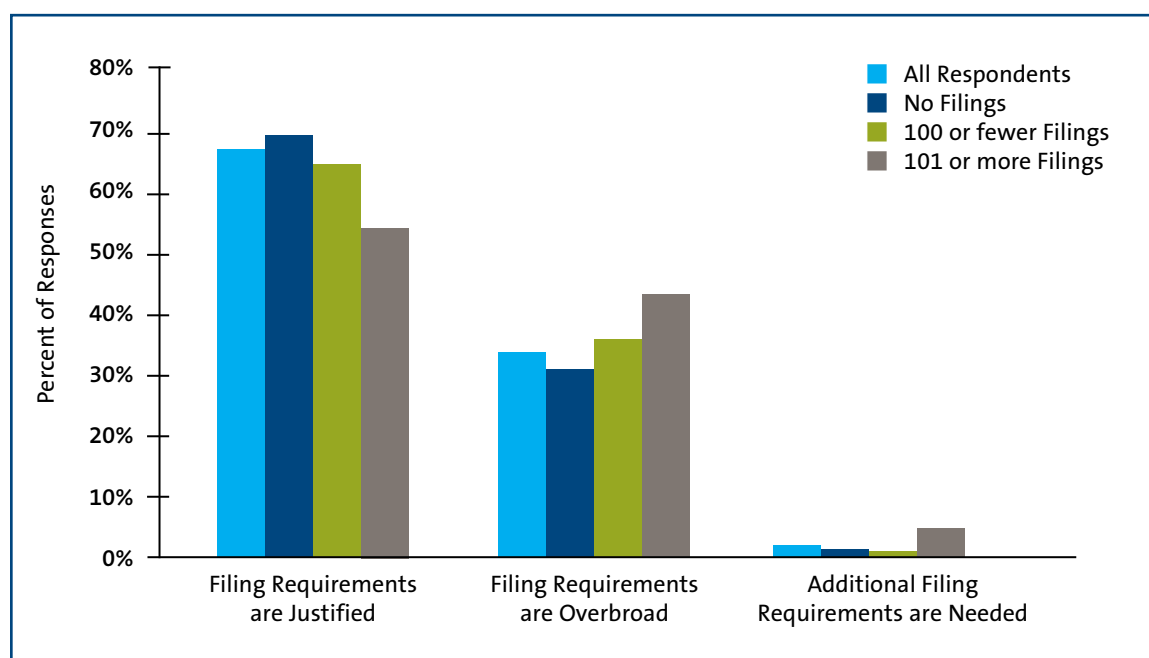
In analyzing respondents' views on the effectiveness of the rules and the associated economic impacts, FINRA staff paid close attention to comparing responses of sub-groups to identify any differences in opinions and experiences across these sub-groups. The sub-groups were selected to identify where different or tiered approaches to regulation or interpretation by FINRA may lead to greater efficiency without loss of investor protection. The sub-group analyses compared views and experiences between, for example firms that file communications versus those that do not, firms of different sizes and firms with different product offerings. In the analysis below, the report discusses comparisons across these sub-groups and other potentially relevant sub-groups to the extent these comparisons provide further insights into the underlying issues.

The survey solicited information on the following six aspects of the communications rules: (1) filing requirements, (2) disclosures, (3) clarity and transparency and definitions, (4) investment adviser versus broker-dealer standards, (5) Web, social media and mobile communications, and (6) administration. In addition, the survey sought information on economic impacts, including direct and indirect costs associated with the rules. FINRA staff's analyses on each of these topics are discussed in turn below.

### 1. Filing Requirements

Most of the respondents (66 percent) reported that the filing requirements are justified for the investor protection they provide, while 32 percent noted that the filing requirements are overbroad. Only 2 percent stated that FINRA should consider additional filings to enhance investor protection. These views were generally consistent across respondents irrespective of their filing activity (as shown in Figure 1 below) or other relevant business characteristics, although more strongly held for firms with no or fewer filings than those most active. For example, more than two-thirds (68 percent) of the firms with no filings stated that the filing requirements are justified, while 53 percent of the frequent filers held this view.

Figure 1: Views on the Effectiveness of Filing Requirements



Respondents that expressed concerns about the filing requirements were asked additional questions to specify particular filings that they considered overbroad. The largest proportion of these respondents identified filings of retail communications concerning registered investment companies (58 percent) as overbroad, followed by prior to use filing requirement for new member firms (32 percent) and retail communications concerning collateralized mortgage obligations (24 percent).

In response to a related question about communications that should be excluded from the filing requirements, most of the respondents (71 percent) selected filing of generic registered investment company retail communications. Two-thirds of these respondents, however, considered 5 percent (or less) of their filings to be generic registered investment company retail communications. Most respondents also supported excluding filing of periodic reports for registered investment companies that are already filed with the SEC, and retail communications distributed to existing customers from the filing requirements.

The survey also solicited views on whether FINRA should expand the filing requirements to additional products. Only 22 percent of the respondents stated that FINRA should require member firms to file communications that apply to other types of investments or services. More than 70 percent of those responding in the affirmative indicated that communications applying to private placements, penny stocks and real estate investment trusts (REITs) should be filed with FINRA. Approximately 21 percent of the responding member firms filed communications on a voluntary basis last year. Voluntary filings were more prevalent among larger firms. For example, 70 percent of the large responding firms filed on a voluntary basis. The most common reason reported for voluntary filings was to obtain FINRA review prior to launching a marketing campaign (60 percent of the voluntary filers), followed by filing to obtain “clean” letters for downstream broker-dealers (50 percent).

## 2. Disclosures

The survey solicited feedback on both risk disclosures and disclosures for fair and balanced comparison of investments or services (comparison disclosures). Most respondents (59 percent) stated that the amount and content of the required risk disclosures are appropriate for the investor protection they provide. Approximately 39 percent, however, noted that risk disclosures are over-inclusive and disproportionately large. The remaining 2 percent proposed that FINRA consider increasing the disclosure requirements. These views were generally consistent across firms with different product offerings, but views differed for firms that regularly rely upon these rules. A much larger proportion of frequent filers (71 percent) or large firms (60 percent) were concerned about over-inclusive risk disclosure. As shown in Table 1 below, respondents’ views on disclosures for fair and balanced comparison of investments or services were generally similar to that for risk disclosures.

**Table 1: Views on Risk and Comparison Disclosures**

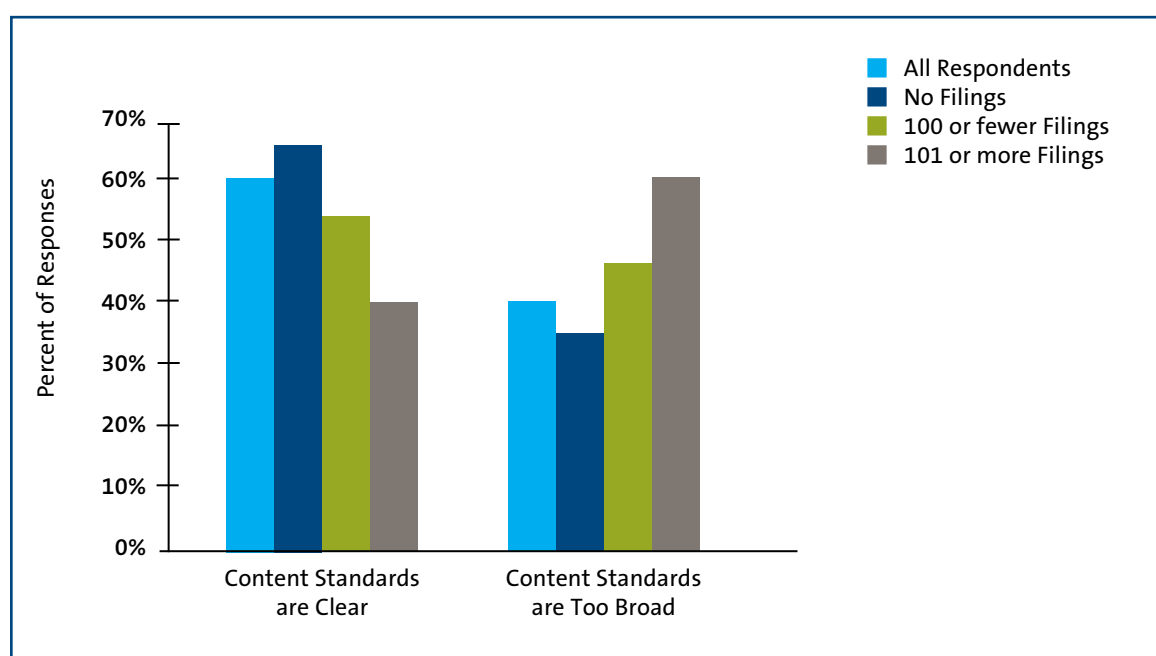
	<b>Risk Disclosures</b>	<b>Comparison Disclosures</b>
The amount and content of the required disclosures are appropriate for the investor protection they provide	59%	64%
The required disclosures are over-inclusive and disproportionately large for the investor protection they provide	39%	35%
FINRA should consider increasing the disclosure requirements to enhance investor protection	2%	2%
Total Respondents	551	544



### 3. Clarity and Transparency and Definitions

Respondents expressed diverse views about the general content standards, such as “principles of fair dealing,” “fair and balanced,” “exaggerated” and “unwarranted.” Approximately 60 percent of the respondents reported that these content standards are clear and, in conjunction with FINRA’s interpretative guidance, can be applied objectively and consistently. The remaining 40 percent of respondents were concerned that these standards are too broad, subjective and difficult to understand. These views varied significantly across respondents and were related to filing their activity, as depicted in Figure 2. While only 35 percent of firms with no filings stated that the content standards are too broad, a larger proportion of respondents with 100 or fewer filings (46 percent) and a majority of frequent filers (60 percent) expressed concerns about clarity of the content standards.

Figure 2: Views on the Content Standards



A substantial proportion of respondents agreed that “projections” or “predictions” are clearly defined and agreed with the statement that prohibitions on these performance measures are necessary for investor protection. At least 40 percent of respondents agreed with these two statements, whereas less than 20 percent disagreed with both.

Respondents expressed similar views as the SMEs and commenters about lack of clarity of certain definitions and the corresponding standards. For example, a plurality of respondents (40 percent) agreed that the “institutional investor” definition is inconsistent within FINRA rules and with definitions of similar terms in the federal securities laws and the SEC rules, while only 13 percent disagreed with that statement. A slightly larger percentage of respondents agreed (46 percent) and disagreed (11 percent) with the assertion that the “correspondence” definition is difficult to track, leading firms to treat all communications to retail investors as retail communications.



Approximately two-thirds (67 percent) of the respondents agreed that FINRA provides sufficient guidance, frequently asked questions and other material on the communications with the public rules. Nonetheless, most respondents identified several aspects of the rules where FINRA should consider providing more clarity and guidance. The largest proportion identified “internal communication” and the associated supervisory obligations (57 percent) for greater clarity and guidance, followed by presentation of other types of performance, including hypothetical performance (51 percent), firm’s responsibility for content controlled and managed by third parties (50 percent), and the general content standards.<sup>9</sup>

#### **4. Investment Adviser vs. Broker-Dealer Standards**

Approximately half of the responding firms have representatives who are also registered with an investment adviser (dually registered). Firms with dually registered representatives generally have similar characteristics as the rest of the responding firms. Forty-five percent of these respondents agreed that investment adviser and broker-dealer standards are not consistent with respect to these rules and should be harmonized, whereas only 10 percent disagreed with this view. Approximately the same proportion of respondents raised concerns about competitive imbalances that may result from these inconsistencies, and about a lack of clarity over which communications rules apply to dual registrants and under what circumstances. Respondents from larger firms, frequent filers or firms offering mutual funds or variable insurance products were more likely to agree with statements about inconsistency and lack of clarity on investment adviser versus broker-dealer standards. For example, 69 percent of larger firms, 63 percent of frequent filers, and 58 percent of firms that offer mutual fund or variable insurance products agreed that investment adviser and broker-dealer standards are not consistent and should be harmonized.

#### **5. Web/Social Media/Mobile Communications**

Most respondents agreed with the key concerns raised by the SMEs and commenters about social media and mobile communications. Approximately two-thirds (67 percent) agreed that FINRA should provide increased flexibility and clarity on the application of its rules to social media and mobile communications, whereas only 6 percent disagreed with this statement. Approximately the same percentage of respondents agreed (64 percent) and disagreed (6 percent) with a related statement about the need for increased flexibility on the presentation of disclosures for communications on websites and mobile devices. The majority also agreed that FINRA should clarify firms’ obligations with respect to links to third-party content, and should provide more guidance on how to distinguish between static and interactive content. As discussed above, frequent filers, larger firms, or mutual fund and variable insurance product firms expressed more concerns about social media and mobile communications.

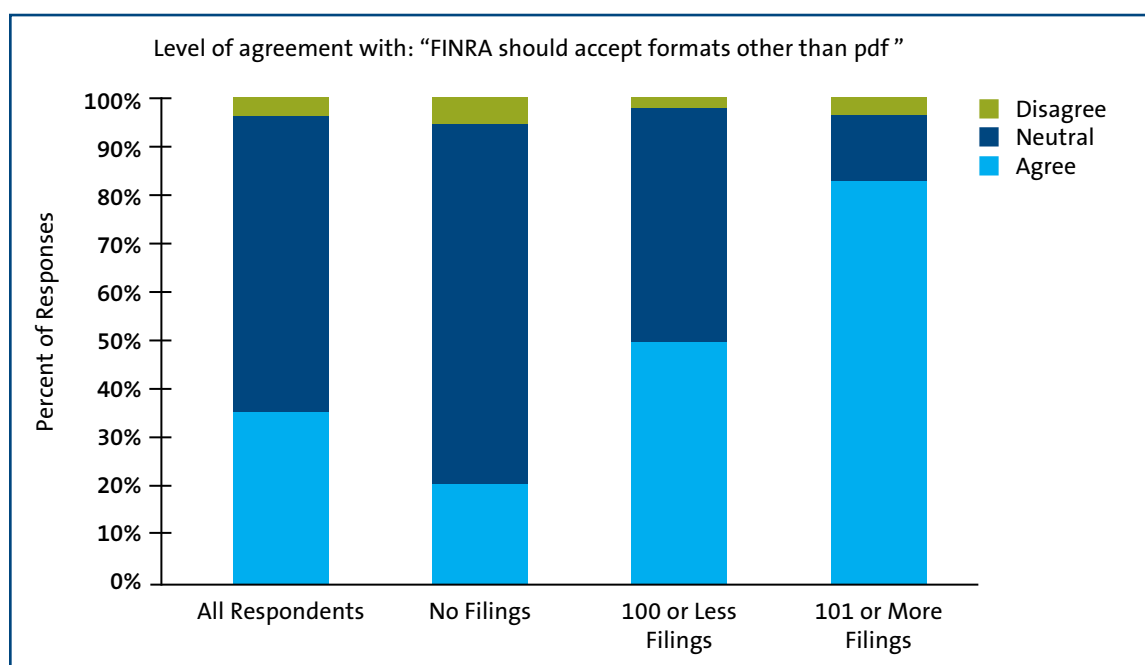
**Table 2: Views on Social Media and Mobile Communications**

	Agree	Neutral	Disagree	Total Respondents
FINRA should provide increased flexibility and clarity on the application of its rules to social media and mobile communications	67%	27%	6%	527
FINRA rules should provide increased flexibility on the presentation of disclosures for communications on websites and mobile devices	64%	30%	6%	524
FINRA should provide more guidance on how to distinguish between static and interactive content	53%	40%	6%	521
FINRA should clarify firms' obligations with respect to links to content on third-party websites and posting third-party content on the firm's website.	63%	34%	3%	522

## 6. Administration

Respondents supported the idea that FINRA should update its electronic filing system to allow submission of material in a format other than PDF. Only 5 percent disagreed with this statement. Respondents' level of agreement on this issue was associated with their filing activity, as shown in Figure 3 below. While 22 percent of the respondents with no filings agreed with the need for submission formats other than PDF, and most of the remaining non-filers were neutral, an overwhelming majority (82 percent) of frequent filers agreed with this statement.

**Figure 3: Views of File Submission Formats**



Most respondents agreed that FINRA should not require filing of previously filed material that only differs in media format. Respondents expressed mixed views on turnaround times and the consistency of feedback and interpretations provided by FINRA staff. Twenty-three percent of the respondents agreed that FINRA's turnaround times for reviewing communications are reasonable, whereas 21 percent disagreed with this statement. The remaining 56 percent were neutral or selected "Not Applicable." Approximately the same proportions of respondents agreed (23 percent) and disagreed (18 percent) with the statement that FINRA staff provides consistent interpretations and feedback on the communications it reviews. A greater proportion of frequent filers, however, disagreed with these statements and expressed concerns about turnaround times and consistency of staff feedback.

## 7. Economic Impacts

The survey included a series of questions seeking information on economic impacts, including costs of the rules. These questions solicited information on the sources of direct and indirect costs and also sought respondents' views on whether these costs are reasonable in light of the investor protection they provide.

Respondent's views on direct and indirect costs were associated with their filing activity. While a majority of the respondents with no filings (58 percent) reported that direct costs of the communications rules are reasonable, most of the frequent filers (55 percent) stated that direct costs are disproportionately burdensome for the investor protection they provide. Similarly, views on indirect costs, including cost or burdens partially or indirectly attributable to the communications rules, varied across respondents based on their filing activity. Approximately 76 percent of the respondents with no filings reported that there are no substantial indirect costs of the communications rules, whereas 71 percent of the frequent filers stated that there are substantial indirect costs associated with these rules.

**Table 3: Views on Direct Costs Associated With Communications Rules**

	All Respondents	Responding Members with		
		No Filings	100 or fewer filings	101 or more filings
Direct costs of the communications rules are reasonable for the investor protection the rules provide	56%	58%	56%	43%
Direct costs are disproportionately burdensome for the investor protection the rules provide	37%	34%	39%	55%
Direct costs of the communications rules are small relative to the investor protection the rules provide	7%	8%	5%	2%
Total Respondents	475	306	125	44

Respondents identified filing fees, salaries of firm advertising review staff and other support staff, and systems and infrastructure costs as the most significant sources of direct costs. While filing fees were reported by the largest proportion of respondents (46 percent) as a significant direct cost to their firms, 75 percent of the respondents also noted that filings fees accounted for less than 10 percent of their direct costs in 2013. The most common indirect costs associated with the rules included less valuable communications to investors, difficulty in offering new products, disruption in marketing campaigns or website redesign, and competitive disadvantage to members relative to investment advisers with respect to prohibitions on performance measures.

## V. Conclusion

Based on the views expressed, FINRA staff believes that the rules have largely been effective in meeting their intended investor protection objectives. However, the staff believes that the rules and FINRA's administration of them may benefit from some updating and recalibration to better align the investor protection benefits and the economic impacts.

As set forth above, the assessment identified several areas where opportunities exist to enhance the efficiency of the rules without reducing investor protection. Significantly, many of the identified areas for potential improvement dovetail with the staff's observations. In addition, the advisory committees, trade organizations and survey results largely validated the views.

In light of the information obtained, the staff recommends exploring a combination of guidance and proposed rule modifications and administrative measures (including systems upgrades) to enhance the effectiveness and efficiency of the rules. The staff recommends initial consideration of the following areas of general agreement among stakeholders:

- ▶ aligning the filing requirements and review process with the relative risk of the communications;
- ▶ facilitating simplified and more effective risk disclosure;
- ▶ providing more guidance regarding application of the content standards, including exploring the adoption of comprehensive performance standards;
- ▶ adapting rules and guidance in light of emerging technologies and communications innovation; and
- ▶ updating FINRA's electronic filing system.

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## Endnotes

1. For purposes of the retrospective review, the communications rules consist of: FINRA Rules 2210 (Communications with the Public); 2212 (Use of Investment Company Rankings in Retail Communications); 2213 (Requirements for the Use of Bond Mutual Fund Volatility Ratings); 2214 (Requirements for Use of Investment Analysis Tools); 2215 (Communications with the Public Regarding Securities Futures); and 2216 (Communications with the Public Regarding Collateralized Mortgage Obligations). It excludes rules governing options and variable insurance communications.
2. See *Notice to Members 80-63* announcing Securities and Exchange Commission (SEC) approval of Article III, Section 35 of the NASD Rules of Fair Practice, which was later codified, as amended, as Rule 2210. Section 35 reflected a compilation of the NASD Board of Governors' "Advertising Interpretation" as well as other provisions contained in the Rules of Fair Practice.
3. See Rule 2210(d). Among other things, Rule 2210 requires that communications be fair and balanced with no material omissions that would cause the content of the communication to mislead and generally bans the use of predictions or projections.
4. See Rule 2210(b)(1). Rule 2210(b) also provides significant exceptions to the principal pre-use approval requirement. For example, firms may post communications on interactive social media forums without principal pre-use approval. Another exception allows firms to use without principal pre-use approval a retail communication that has already been approved by a principal of another firm (such as a product underwriter or distributor), provided the communication has been filed with FINRA's Advertising Regulation Department, and received a "consistent with standards" review letter.
5. See Rule 2210(c). Rule 2210(c) also provides significant exceptions to the filing requirements, including, among others, retail communications that previously have been filed with FINRA and that are to be used without material change; are based on previously filed templates that are changed only to update statistical or other non-narrative information; or are posted on an online interactive electronic forum.
6. See Rule 2210(c)(6).
7. Based on FINRA By-Laws, Article I (Definitions), firms with 150 or fewer registered representatives are classified as small, firms with 150-499 representatives are classified as mid-size, and firms with 500 or more representatives are classified as large.
8. The staff notes that while firms may communicate with the public without filing such materials pursuant to the rules covered in this retrospective review, they remain subject to other requirements of these rules. Accordingly, responding firms with no filings may still have experience with several key aspects of the rules.
9. Other areas that some respondents thought could benefit from more clarity and guidance included "predictions" or "projections" of performance, filing and principal approval exceptions from retail communications, and institutional communications forwarded to retail investors by intermediaries.

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Investor protection. Market integrity.

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